

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 MELISSA D. WILSON,) Case No. EDCV 15-0441-JPR
12)
13 Plaintiff,)
14)
15 v.) MEMORANDUM OPINION AND ORDER
16) REVERSING COMMISSIONER
17)
18 CAROLYN W. COLVIN, Acting)
19 Commissioner of Social)
20 Security,)
21)
22 Defendant.)
23 _____)
24)
25)
26)
27)
28)

18 I. PROCEEDINGS

19 Plaintiff seeks review of the Commissioner's final decision
20 denying her application for supplemental security income benefits
21 ("SSI"). The parties consented to the jurisdiction of the
22 undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c). The
23 matter is before the Court on the parties' Joint Stipulation,
24 filed December 21, 2015, which the Court has taken under
25 submission without oral argument. For the reasons stated below,
26 the Commissioner's decision is reversed and this matter is
27 remanded for further proceedings.
28

1 **II. BACKGROUND**

2 Plaintiff was born in 1971. (Administrative Record ("AR")
3 137.) She completed 11th grade and worked as a photocopy
4 operator and overnight stocker. (AR 29, 178.)

5 On April 15, 2011, Plaintiff applied for SSI, alleging that
6 she had been unable to work since February 20, 2004, because of
7 bipolar disorder, depression, and anxiety disorder. (AR 78, 137-
8 38, 177.) After her application was denied initially and on
9 reconsideration, she requested a hearing before an Administrative
10 Law Judge. (AR 104.) A hearing was held on March 19, 2013, at
11 which Plaintiff, who was represented by counsel, testified, as
12 did a vocational expert. (AR 38-65.) In a written decision
13 issued September 24, 2013, the ALJ found Plaintiff not disabled.
14 (AR 20-31.) On January 13, 2015, the Appeals Council denied
15 Plaintiff's request for review. (AR 1.) This action followed.

16 **III. STANDARD OF REVIEW**

17 Under 42 U.S.C. § 405(g), a district court may review the
18 Commissioner's decision to deny benefits. The ALJ's findings and
19 decision should be upheld if they are free of legal error and
20 supported by substantial evidence based on the record as a whole.
21 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra
22 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
23 evidence means such evidence as a reasonable person might accept
24 as adequate to support a conclusion. Richardson, 402 U.S. at
25 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).
26 It is more than a scintilla but less than a preponderance.
27 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
28 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether

1 substantial evidence supports a finding, the reviewing court
2 "must review the administrative record as a whole, weighing both
3 the evidence that supports and the evidence that detracts from
4 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
5 720 (9th Cir. 1996). "If the evidence can reasonably support
6 either affirming or reversing," the reviewing court "may not
7 substitute its judgment" for the Commissioner's. Id. at 720-21.

8 **IV. THE EVALUATION OF DISABILITY**

9 People are "disabled" for purposes of receiving Social
10 Security benefits if they are unable to engage in any substantial
11 gainful activity owing to a physical or mental impairment that is
12 expected to result in death or has lasted, or is expected to
13 last, for a continuous period of at least 12 months. 42 U.S.C.
14 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
15 1992).

16 **A. The Five-Step Evaluation Process**

17 The ALJ follows a five-step sequential evaluation process to
18 assess whether a claimant is disabled. 20 C.F.R.
19 § 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.
20 1995) (as amended Apr. 9, 1996). In the first step, the
21 Commissioner must determine whether the claimant is currently
22 engaged in substantial gainful activity; if so, the claimant is
23 not disabled and the claim must be denied. § 416.920(a)(4)(i).

24 If the claimant is not engaged in substantial gainful
25 activity, the second step requires the Commissioner to determine
26 whether the claimant has a "severe" impairment or combination of
27 impairments significantly limiting her ability to do basic work
28 activities; if not, the claimant is not disabled and the claim

1 must be denied. § 416.920(a)(4)(ii).

2 If the claimant has a "severe" impairment or combination of
3 impairments, the third step requires the Commissioner to
4 determine whether the impairment or combination of impairments
5 meets or equals an impairment in the Listing of Impairments
6 ("Listing") set forth at 20 C.F.R. part 404, subpart P, appendix
7 1; if so, disability is conclusively presumed.

8 § 416.920(a)(4)(iii).

9 If the claimant's impairment or combination of impairments
10 does not meet or equal an impairment in the Listing, the fourth
11 step requires the Commissioner to determine whether the claimant
12 has sufficient residual functional capacity ("RFC")¹ to perform
13 her past work; if so, she is not disabled and the claim must be
14 denied. § 416.920(a)(4)(iv). The claimant has the burden of
15 proving she is unable to perform past relevant work. Drouin, 966
16 F.2d at 1257. If the claimant meets that burden, a prima facie
17 case of disability is established. Id.

18 If that happens or if the claimant has no past relevant
19 work, the Commissioner then bears the burden of establishing that
20 the claimant is not disabled because she can perform other
21 substantial gainful work available in the national economy.
22 § 416.920(a)(4)(v); Drouin, 966 F.2d at 1257. That determination
23 comprises the fifth and final step in the sequential analysis.
24 § 416.920(a)(4)(v); Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d
25 at 1257.

26
27 ¹ RFC is what a claimant can do despite existing exertional
28 and nonexertional limitations. § 416.945; see Cooper v.
Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 B. The ALJ's Application of the Five-Step Process

2 At step one, the ALJ found that Plaintiff had not engaged in
3 substantial gainful activity since April 15, 2011, the
4 application date. (AR 22.) At step two, she concluded that
5 Plaintiff had the severe impairments of bipolar disorder and
6 anxiety disorder. (Id.) At step three, the ALJ determined that
7 Plaintiff's impairments did not meet or equal any of the
8 impairments in the Listing. (AR 23.) At step four, she found
9 that Plaintiff had the RFC to perform "a full range of work at
10 all exertional levels" but with nonexertional restrictions. (AR
11 24.) Specifically, Plaintiff was limited to "simple work with
12 one to two steps" and to "a work environment that does not
13 require interaction with other workers and allows for no
14 interaction with the general public." (AR 24-25.) In addition,
15 she could not "maintain attention and concentration for extended
16 periods, but only for a short time," and she required a "stable
17 work environment with a stable work setting where the work tasks
18 do not change day-to-day." (AR 25.) Based on the VE's
19 testimony, the ALJ concluded that Plaintiff could not perform her
20 past relevant work as a photocopy operator or overnight stocker.
21 (AR 29.) At step five, the ALJ found that Plaintiff could
22 perform three medium, unskilled jobs existing in significant
23 numbers in the national economy: ground-maintenance worker, DOT
24 406.687-010, 1991 WL 673342; laundry worker, DOT 361.684-014,
25 1991 WL 672983; and vehicle cleaner, DOT 919.687-014, 1991 WL
26 687897. (Id.) Accordingly, she found Plaintiff not disabled.
27 (AR 30.)
28

1 **V. DISCUSSION**

2 The ALJ Erred in Relying on the Vocational Expert's Testimony to
3 Find that Plaintiff Could Perform Other Work

4 Plaintiff challenges the ALJ's finding at step five that she
5 could perform other work existing in significant numbers in the
6 national economy. Specifically, she contends the ALJ erred in
7 relying on the VE's testimony because the RFC's limitation to
8 "simple work with one to two steps" was inconsistent with the
9 Level-Two-reasoning jobs identified by the VE. (J. Stip. at 4-8,
10 11.)

11 A. Applicable law

12 At step five of the five-step process, the Commissioner has
13 the burden to demonstrate that the claimant can perform some work
14 that exists in "significant numbers" in the national or regional
15 economy, taking into account the claimant's RFC, age, education,
16 and work experience. Tackett v. Apfel, 180 F.3d 1094, 1100 (9th
17 Cir. 1999); 42 U.S.C. § 423(d)(2)(A); 20 C.F.R. § 416.960(c).
18 The Commissioner may satisfy that burden either through the
19 testimony of a VE or by reference to the Medical-Vocational
20 Guidelines appearing in 20 C.F.R. part 404, subpart P, appendix
21 2. Tackett, 180 F.3d at 1100-01; see also Hill v. Astrue, 698
22 F.3d 1153, 1161 (9th Cir. 2012). When a VE provides evidence
23 about the requirements of a job, the ALJ has a responsibility to
24 ask about "any possible conflict" between that evidence and the
25 DOT. See SSR 00-4p, 2000 WL 1898704, at *4 (Dec. 4, 2000);
26 Massachi v. Astrue, 486 F.3d 1149, 1152-54 (9th Cir. 2007)
27 (holding that application of SSR 00-4p is mandatory). When an
28 "apparent conflict" exists between the VE's testimony and the

1 DOT, the ALJ is required to "reconcile the inconsistency."
2 Zavalin v. Colvin, 778 F.3d 842, 846 (9th Cir. 2015). An ALJ's
3 failure to ask the VE to explain any apparent conflict or to
4 determine whether the VE's explanation is reasonable is
5 procedural error, but the error is harmless if no actual conflict
6 existed or the VE provided sufficient evidence to support the
7 deviation. Massachi, 486 F.3d at 1154 n.19.

8 B. Relevant background

9 The ALJ presented to the VE a hypothetical person of
10 Plaintiff's age, education, and work history with the following
11 limitations:

12 this individual would be limited to simple work with one
13 to two steps.

14 This individual would need a work environment that
15 did not require interaction with other workers to
16 accomplish the work. And would have no interactions with
17 the general public. Also this individual would have
18 limitations in some work functions.

19 Like for example the individual would not be able to
20 maintain attention and concentration for extended
21 periods. And would need a job that could be accomplished
22 in short, very short time period.

23 The individual would need a stable work environment
24 where the work setting and the work tasks did not change
25 from day to day.

26 (AR 53.) The VE testified that such a person would not be able
27 to perform Plaintiff's past relevant work but would be able to
28 perform the following medium, unskilled jobs: ground-maintenance

1 worker, DOT 406.687-010, 1991 WL 673342; laundry worker, DOT
2 361.684-014, 1991 WL 672983; and vehicle cleaner, DOT 919.687-
3 014, 1991 WL 687897. (Id.) The ALJ did not ask the VE if her
4 testimony was consistent with the DOT. (See AR 53-64.)
5 Plaintiff's counsel then cross-examined the VE, but he did not
6 question her about any potential conflict with the DOT. (See AR
7 54-64.)

8 In her decision, the ALJ relied on the VE's testimony to
9 find that Plaintiff could perform other work, noting that
10 "[p]ursuant to SSR 00-4p," the VE's testimony was "consistent
11 with" the DOT. (AR 30.)

12 C. Analysis

13 The DOT defines "six GED Reasoning Levels that range from
14 Level One (simplest) to Level Six (most complex)." Rounds v.
15 Comm'r Soc. Sec. Admin., 807 F.3d 996, 1002 (9th Cir. 2015) (as
16 amended). The lowest, Level One, is defined as follows:

17 Apply commonsense understanding to carry out simple one-
18 or two-step instructions. Deal with standardized
19 situations with occasional or no variables in or from
20 these situations encountered on the job.

21 DOT app. C - Components of the Definition Trailer, § III, 1991 WL
22 688702. Level Two, on the other hand, is defined as follows:

23 Apply commonsense understanding to carry out detailed but
24 uninvolved written or oral instructions. Deal with
25 problems involving a few concrete variables in or from
26 standardized situations.

27 Id. According to the DOT, the three jobs identified by the VE
28 require Level Two reasoning. See DOT 406.687-010, 1991 WL 673342

1 (ground-maintenance worker); DOT 361.684-014, 1991 WL 672983
2 (laundry worker); DOT 919.687-014, 1991 WL 687897 (vehicle
3 cleaner).

4 Despite the ALJ's statement in her decision that the VE's
5 testimony was consistent with the DOT (AR 30), an apparent
6 conflict existed between Plaintiff's RFC limitation to "simple
7 work with one to two steps" and the Level Two reasoning required
8 in the jobs identified by the VE. See Rounds, 807 F.3d at 1003.
9 The ALJ did not ask the VE to clarify or explain the
10 inconsistency as required under SSR 00-4p. See 2000 WL 1898704,
11 at *4; Massachi, 486 F.3d at 1152-54. Thus, the ALJ erred by
12 failing to resolve the conflict and was not entitled to rely on
13 the VE's testimony in finding that Plaintiff could perform other
14 work. See Rounds, 807 F.3d at 1004; Tester v. Colvin, 624 F.
15 App'x 485, 487-88 (9th Cir. 2015) (finding that ALJ erred by
16 failing to resolve apparent conflict between RFC limitation of
17 "simple, 1-2 step work" and Level-Two-reasoning jobs identified
18 by VE and noting that case was "indistinguishable from Rounds").

19 Further, the ALJ's failure to resolve the conflict was not
20 harmless. The ALJ gave "great" weight to the opinions of the
21 consultative examining psychiatrist and one of Plaintiff's
22 treating psychiatrists, who both assessed that Plaintiff could
23 carry out detailed instructions.² (AR 28.) Dr. Ashraf Elmashat,
24 the consultative examining psychiatrist, opined that Plaintiff
25 could "understand, remember, and carry out simple one or two-step
26

27
28 ² Plaintiff does not challenge the ALJ's assessment of the
medical-opinion evidence. (See J. Stip. at 4.)

1 job instructions" and also "do detailed and complex
2 instructions." (AR 289 (emphases omitted).) Likewise, Dr. Norma
3 Aguilar, Plaintiff's treating psychiatrist, opined that Plaintiff
4 could understand, remember, and carry out both detailed and "very
5 short and simple" instructions. (AR 623.) Nevertheless, in her
6 discussion of Dr. Elmashat's opinion, the ALJ noted that "based
7 on the record as a whole," she assessed "slightly more
8 restrictive" limitations in her RFC determination than those
9 assessed by Dr. Elmashat. (AR 28.) Accordingly, she found that
10 Plaintiff could do only "simple work with one to two steps" (AR
11 25), tracking the limitations assessed by the nonexamining state-
12 agency physicians, who opined that Plaintiff's ability to "carry
13 out detailed instructions" was moderately limited and her ability
14 to "carry out very short and simple" instructions was not
15 significantly limited (AR 73, 86). Thus, although some of the
16 credited medical evidence indicated that Plaintiff could "carry
17 out detailed but uninvolved . . . instructions" as required in
18 Level Two reasoning, 1991 WL 688702, the ALJ expressly adopted a
19 more restrictive RFC. Because the ALJ's failure to resolve this
20 inconsistency was directly relevant to the issue of whether
21 Plaintiff could perform other work in the national economy, the
22 error was not harmless. See Rounds, 807 F.3d at 1004; see also
23 Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1055 (9th Cir.
24 2006) (ALJ's error is harmless when "inconsequential to the
25 ultimate nondisability determination"). Accordingly, Plaintiff
26 is entitled to remand on this ground.

1 D. Remand for Further Proceedings Is Appropriate

2 When, as here, an ALJ errs in denying benefits, the Court
3 generally has discretion to remand for further proceedings. See
4 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000) (as
5 amended). When no useful purpose would be served by further
6 administrative proceedings, however, or when the record has been
7 fully developed, it is appropriate under the "credit-as-true"
8 rule to direct an immediate award of benefits. See id. at 1179
9 (noting that "the decision of whether to remand for further
10 proceedings turns upon the likely utility of such proceedings");
11 Garrison v. Colvin, 759 F.3d 995, 1019-20 (9th Cir. 2014).

12 Here, further administrative proceedings would serve the
13 useful purpose of allowing the ALJ to address whether
14 Petitioner's limitation to simple work with one to two steps is
15 consistent with jobs requiring Level Two reasoning. Thus, the
16 credit-as-true rule does not apply, and remand is appropriate.
17 See id. at 1020 n.26 (credit-as-true rule requires that "there
18 are no outstanding issues that must be resolved before a
19 determination of disability can be made").

20 On remand, the ALJ must determine whether there is a
21 reasonable basis for relying on the VE's testimony.
22 Alternatively, the ALJ may ask the VE to identify other jobs that
23 require Level One reasoning or that Plaintiff can perform. See
24 Rounds, 807 F.3d at 1004 & n.5.

1 **VI. CONCLUSION**

2 Consistent with the foregoing, and under sentence four of 42
3 U.S.C. § 405(g),³ IT IS ORDERED that judgment be entered
4 REVERSING the decision of the Commissioner, GRANTING Plaintiff's
5 request for remand, and REMANDING this action for further
6 proceedings consistent with this Memorandum Opinion. IT IS
7 FURTHER ORDERED that the Clerk serve copies of this Order and the
8 Judgment on counsel for both parties.

9
10 DATED: May 24, 2016

11 
12 JEAN ROSENBLUTH
13 U.S. Magistrate Judge
14
15
16
17
18
19
20
21
22
23
24

25
26 ³ That sentence provides: "The [district] court shall have
27 power to enter, upon the pleadings and transcript of the record,
28 a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."